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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 609

EDWARD S. HARVEY AND JAMES F. MANN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 69) [1] is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 24, 1952 (R. 71). The petition for a writ of certiorari was filed on February 23,

[1] "R." refers to the printed joint appendix and "Tr." to the original stenographic transcript of record.

1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTIONS PRESENTED

1. Whether probable cause existed for the arrest of petitioners without a warrant so as to render admissible in evidence against them incriminating articles found upon their persons at the time of their arrest.

2. Whether, in any event, petitioners had standing to suppress the articles as evidence in view of their denial that they ever possessed them and that they were found upon their persons.

STATUTES INVOLVED

22 D. C. Code [1940 ed.] 1304:

> Whoever falsely represents himself to be a judge of the municipal court, notary public, police officer, or other public officer, or a minister qualified to celebrate marriage, and attempts to perform the duty or exercise the authority pertaining to any such office or character, or having been duly appointed to any of such offices shall knowingly attempt to act as any such officers after his appointment or commission has expired or he has been dismissed from such office, shall suffer imprisonment in the penitentiary for not less than one year nor more than three years.

22 D. C. Code [1940 ed.] 2305:

> Whoever verbally or in writing accuses or threatens to accuse any person of a crime or of

any conduct which, if true, would tend to disgrace such other person, or in any way subject him to the ridicule or contempt of society, or threatens to expose or publish any of his infirmities or failings, with intent to extort from such other person anything of value or any pecuniary advantage whatever, or to compel the person accused or threatened to do or to refrain from doing any act, and whoever with such intent publishes any such accusation against any other person shall be imprisoned for not more than five years or be fined not more than one thousand dollars, or both.

STATEMENT

On February 12, 1951, in the District Court for the District of Columbia, a three-count indictment (R. 2-3) was filed against petitioners and one August Mazzaro. The first count charged that on January 24, 1951, petitioners falsely represented themselves to be police officers to one Lee W. Thuma, in violation of 22 D.C. Code [1940 ed.] 1304. The second count charged petitioners and Mazzaro with a similar offense on February 1, 1951. The third count charged petitioners and Mazzaro with threatening to accuse Thuma of being a degenerate and sexual pervert, with intent to extort $1,250 from him, in violation of 22 D.C. Code [1940 ed.] 2305. After a jury trial, petitioners were convicted on the first and third counts, the second having been dismissed on motion of the Government.[2] Petitioners were sentenced

[2] Defendant Mazzaro was not tried with petitioners.

to imprisonment for one to three years on count one, and for twenty months to five years on count three, the sentences to run concurrently (R. 4). On January 24, 1952, the convictions were affirmed by the Court of Appeals for the District of Columbia Circuit (R. 69-71).

On March 20, 1951, prior to the trial, petitioners each filed a motion to suppress certain evidence. Each averred that "he is informed that the said articles were allegedly seized and removed from his person," that petitioner was not committing a crime at the time of his arrest without a warrant, nor did the arresting officer have reason to believe that a crime was being committed, that "he is advised that the arresting officer claims to have taken certain articles from his person while under such arrest," and that the "articles allegedly seized consisted of a badge bearing the words City Police and an identification card bearing the words, Washington Police Association." (R. 3-4.)

After a hearing on stipulated facts, the court denied the motions to suppress, holding that the police officers had probable cause to believe that petitioners were committing a felony, that the arrests were therefore valid, and that the incidental searches of petitioners' persons were proper (R. 61-67).

At the trial, at which the objection to the introduction of the badges and card was renewed

(R. 14-15; Pet. 4), the Government adduced the following evidence:

Complainant Thuma, a retired Government worker, testified that on the afternoon of January 24, 1951, while he was using the toilet facilities in the men's room of the Y.M.C.A., petitioner Harvey entered, approached him, and exposed his "private" (R. 5-6, 23-24). After being pushed away, Harvey asked Thuma whether he was a member of the Y. When Thuma answer in the negative, Harvey produced a police badge, told Thuma he was under arrest and would have to come with him, and not "to start anything" because it would "go hard" with him. (R. 6.) Harvey escorted Thuma to the street where petitioner Mann was waiting. Harvey told Mann that he had just arrested Thuma and that Thuma was a "queer." (R. 6-7, 25.) Mann produced a police badge similar to Harvey's (R. 8) and the two men escorted Thuma on a short walk. Harvey then departed leaving Thuma in Mann's custody, and after the latter questioned him at length about his personal financial status, Thuma was released. (R. 8, 29-30.)

The following week, around 10:30 a.m. on February 1, 1951, petitioners accosted Thuma on the street just as he was leaving his house. Harvey told Thuma that he would have to come to police headquarters with them at once. (R. 9.) In the

car, which was driven by Mann, a third man, also posing as a police officer (R. 10), told Thuma that both Harvey and Mann were in trouble for not previously turning Thuma in at police headquarters, and asked if Thuma could put up a "$2,500 cash bond" (R. 10-11, 32). Thuma said he could not post such a bond but could obtain a bond from a bonding company. He was told that "that kind of a bond wouldn't do; that it would have to be a cash bond." After some discussion as to how much cash Thuma could raise, the third man agreed to accept $1,250. (R. 11-12.) Mann and the third party then drove away, leaving Thuma and Harvey to wait for a cab to take them to Thuma's bank (R. 12-13).

Thuma and Harvey then went in a cab to Thuma's home on his pretense that he had to get the keys to his safety deposit box (R. 13-14). While he was in his house, Thuma telephoned the police (R. 16). Thuma asked the police about the license plates used on police cars and gave the number—D.C., R-44—he had noted on the car Mann was driving (R. 13, 16). He was advised that it was a rented car. He told the police he thought he was "being blackmailed," that three men who said they were police officers were demanding money from him, and that he and one of the men were at that moment on the way to the Riggs National Bank at 14th and Park Road, where he was to get $1,250 from his safe deposit box

and turn it over to them. He asked that "protection" for him be sent to the bank and was told that the police "would have someone out there." (R. 16; see also R. 61-63.)

When Thuma and Harvey arrived at the bank, Harvey waited inside the door while Thuma went to the vault, where he talked to Bryarly, an official of the bank. As a result of this conversation, Thuma telephoned the police from the vault. He then placed three $1 bills, the serial numbers of which had been recorded by Bryarly, in an envelope, which he sealed and marked as petitioners had directed him. (R. 17-19.) Thuma left the bank vault and, accompanied by Bryarly (R. 38), walked to where Harvey was sitting just inside the door and offered him the envelope (R. 19-20, 38). Harvey turned, however, and started out the door, followed by Thuma. Detective Herlihy, who had been in the bank during this time, followed Harvey to the sidewalk outside and then arrested him. (R. 20, 37-38.)

Officers Herlihy, Roche and Fuss testified that, acting on the information received over the telephone, they had gone to the corner of 14th and Park Road (R. 36-37, 40-41, 47-48). Fuss spotted the car bearing license number R-44 parked with two men sitting in it; one of these men left while Fuss waited for the other two officers (R. 48). When Herlihy and Roche arrived at the scene, they arrested Mann, who was still seated in the

car (R. 37, 42). While Herlihy was in the bank (R. 37), Roche searched Mann and found a police badge on his person (R. 42). Herlihy remained in the bank for 10 or 15 minutes until he saw Thuma offer the envelope to Harvey (R. 38). A search of Harvey's person revealed a police badge similar to that found on Mann, and a police card (R. 43, 46, 48). Harvey denied knowing Mann, and denied that he had ever seen the badge just removed from his pocket (R. 43). He stated that he was a race track tout, that he was on his way to Florida from New York, and that he was just taking a walk in the neighborhood (R. 43; Tr. 164, 192). However, Mann, upon seeing the arrest of Harvey across the street, admitted that Harvey was his "buddy" (R. 42).

ARGUMENT

1. Petitioners contend that the police badges and identification card seized from their persons should not have been admitted in evidence against them for the reason that their arrest was illegal because made without warrant and without probable cause for belief that petitioners had committed, or were committing, a felony (Pet. 8-14).

It has long been settled that the person of one lawfully arrested may be searched, and that anything found on him may be used in evidence against him. *United States* v. *Rabinowitz*, 339 U.S. 56, 61; *Agnello* v. *United States*, 269 U.S. 20, 30; *Carroll* v. *United States*, 267 U.S. 132, 158. And it is estab-

lished that an officer of the District of Columbia may lawfully arrest without warrant persons who he has probable cause to believe have committed a felony. *Newyahr* v. *United States*, 177 F. 2d 658 (C.A.D.C.), certiorari denied, 338 U.S. 936; *Shettel* v. *United States*, 113 F. 2d 34 (C.A.D.C.); *Maghan* v. *Jerome*, 88 F. 2d 1001, 1002 (C.A.D.C.).

As this Court has frequently observed, there is no precise formula for determining probable cause or reasonableness; each case must be viewed in the light of its own facts and circumstances. *United States* v. *Rabinowitz*, 339 U.S. at 60, 63; *Brinegar* v. *United States*, 338 U.S. 160, 172-176; *Go-Bart Co.* v. *United States*, 282 U.S. 344, 357. It is clear that the standard of proof required to show probable cause is far less stringent than that required to establish guilt; and that nothing more is required to justify an arrest than that the circumstances known to the officer, by personal observation or by reasonably trustworthy information, were such as would justify a man of reasonable caution in the belief that a felony had been, or was being, committed. *Brinegar* v. *United States*, *supra*; *Carroll* v. *United States*, 267 U.S. at 161-162. Thus, an arrest without a warrant may be based upon hearsay evidence. *United States* v. *Bianco*, 189 F. 2d 716, 720-721 (C.A. 3); *United States* v. *Li Fat Tong*, 152 F. 2d 650, 652 (C.A. 2); *United States* v. *Heitner et al.*, 149 F. 2d 105, 106 (C.A. 2), certiorari denied *sub nom. Cryne* v. *United States*, 326 U.S. 727.

Here, the officers knew that a man had telephoned police headquarters to report that he thought he was being blackmailed because three men, posing as police officers, were demanding $1,250 from him; that he was at that moment proceeding with one of the men to the bank at 14th and Park Road to obtain the money for them; that the men were travelling about in a rented car bearing license number R-44; and that the victim wanted protection sent to the bank (R. 16, 61-64). Moreover, the second telephone call from the bank gave the police definite information concerning "someone in the bank" (R. 40).

Captain Fuss, the officer in charge of the investigation (R. 47), and the first to arrive on the scene, observed that a car bearing license number R-44, was parked across the street from the bank. Two men were seated inside (R. 48). This in itself, we submit, sufficiently corroborated the information received by the telephone call so as to justify a man of reasonable caution in concluding that the occupants of the car were probably committing the crimes complained of. The occupants were not arrested immediately, however, and such caution was exercised in keeping the car under observation that one of them escaped while Captain Fuss awaited the arrival of Detectives Herlihy and Roche (R. 48). Upon the latter's arrival, petitioner Mann was arrested in the vehicle, searched, and the spurious police paraphernalia was found.

In the bank, Herlihy observed petitioner Harvey sitting inside the door for ten or fifteen minutes. He saw Thuma, accompanied by the bank official, approach Harvey and tender him an envelope and he observed Harvey's suspicious conduct in refusing the tender and beating a hasty retreat. (R. 20, 37-38, 48.) Not until then was Harvey arrested. The ensuing search of his person revealed police paraphernalia similar to that found on Mann (R. 43, 46, 48-49).

It is true, as petitioners assert (Pet. 10-12), that their conduct under the observation of the police was outwardly consistent with innocence. However, in determining the existence of probable cause for an arrest without a warrant, it is not necessary to exclude every hypothesis of innocence. *United States* v. *Bianco*, 189 F. 2d 716, 720 (C.A. 3).[3] The presence of the two men in the described car, at the described time and place, the presence of a third man inside the bank who hastily retreated when the envelope was tendered to him in the presence of the bank official, the knowledge that bona fide officers do not as a rule travel in rented cars, were all factors, which, considered in context, corroborated the information the police had received over the phone. The insufficient period of time to obtain a warrant[4]

[3] "The investigating agent is not required to separate particular facts from the context of the case or to discover their significance alone. For they are not alone, and the reasonable mind does not evaluate them alone."

[4] See *United States* v. *Spadafora*, 181 F. 2d 957 (C.A. 7), certiorari denied, 340 U.S. 897, where Government agents

and the circumstance that petitioners were travelling by automobile in perpetrating their crimes necessitated their arrest without a warrant. "* * * the likelihood of escape of a suspect with an automobile near an urban community is too strong to ignore; the chances of successful pursuit, far too risky to rely on." *United States* v. *Bianco, supra,* at 722. Accordingly, we submit that, in the light of all the circumstances of this case, the actions of the officers were, as the courts below held (R. 67, 70), the actions of reasonably prudent and cautious men.

2. Petitioners also challenge (Pet. 14-19) the additional ground of the decision below that they had no standing to suppress the police badges and identification cards because they denied possession of the articles and denied that they were seized from their persons (R. 70).

In their pre-trial motions, petitioners averred that the articles were "allegedly seized" from their persons. No claim was asserted of any proprietary or possessory interest in the articles which the "arresting officer claims to have taken" from petitioners, nor did petitioners ask for return of the property (R. 3-4).[5] At the trial, petitioners ex-

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received a call at 8:00 p.m. informing them that the defendant had delivered counterfeit notes to a certain person's home and the agents reached there about 8:30 p.m. and arrested the defendant and seized counterfeit money nearby. The court held the arrest without a warrant was lawful and the seizure of the evidence entirely proper.

[5] Clearly, a person has no standing to seek the return of property in which he has no proprietary or possessory interest

pressly denied that the articles had been taken from their persons or that they had ever seen them until after they were arrested (Tr. 110-111, 154-155, 163-164, 192).

Petitioners' position, then, is rather anomalous; they seek to invoke the exclusionary rule, yet they steadfastly maintain that the evidence complained of was not seized from their persons or premises. The rights under the Fourth Amendment are personal and, *a fortiori,* the rule which petitioners would invoke is a personal remedy, which can only be asserted by one whose rights of security in person or property have been violated by an illegal search and seizure.[6] "Indeed, the exclusion of evidence is a remedy which directly serves only to protect those upon whose person or premises something incriminating has been found." *Wolf* v. *Colorado,* 338 U.S. 25, 30-31. Petitioners' denial of any seizure of evidence from their persons clearly demonstrated that at the outset, they failed to bring themselves within the scope of Rule 41(e), F.R. Crim. P., which provides that "A person aggrieved by an unlawful search and seizure may move * * *

(*Shields* v. *United States,* 26 F. 2d 993, 996 (C.A.D.C.)), nor "to ask for the return of the property to a third person." *Kelleher* v. *United States,* 35 F. 2d 877, 879 (C.A.D.C.). Cf. *United States* v. *Jeffers,* 342 U.S. 48, 54.

[6] *Goldstein* v. *United States,* 316 U.S. 114, 121; *Gibson* v. *United States,* 149 F. 2d 381 (C.A.D.C.), certiorari denied *sub nom. O'Kelley* v. *United States,* 326 U.S. 724; *Kitt* v. *United States,* 132 F. 2d 920, 922 (C.A. 4); *Shore* v. *United States,* 49 F. 2d 519, 522 (C.A.D.C.), certiorari denied, 283 U.S. 865.

to suppress for use as evidence *anything so obtained*" (italics supplied).

Both *United States* v. *Jeffers*, 342 U.S. 48, and *United States* v. *Blok*, 188 F. 2d 1019 (C.A.D.C.), relied upon by petitioners, are inapposite. In *Jeffers*, this Court held that the fact that the evidence there seized was not on that petitioner's premises did not deprive him of standing to suppress it as evidence. There, however, the petitioner *claimed ownership* of the seized articles. In *Blok*, although the appellee disclaimed ownership, there was no denial that the evidence was seized from her desk, and the court held that her exclusive right to use the desk afforded sufficient standing to suppress the evidence complained of.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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